Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. _____

KEE JOE BENALLY, et al.,
Petitioners,

against

UNC RESOURCES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARTER MOREY
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Tucson, Arizona 85701

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Tucson, Arizona 85701

Attorneys for
Petitioners

September 19, 1983

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QUESTIONS PRESENTED

WHETHER NEW MEXICO TORT LAW PERMITTING THE IMPOSITION OF PUNITIVE DAMAGES MAY BE APPLIED IN AN ACTION FOR THE FAILURE OF A URANIUM MILL TAILINGS STRUCTURE.

A. Whether state tort law imposing punitive damages may, consistently with the Federal Atomic Energy Act, be applied in a tort action for failure of a uranium mill tailings structure.

B. Whether New Mexico's agreement with the Nuclear Regulatory Commission under 42 U.S.C. §2021 for the regulation of uranium mill tailings permits the imposition of New Mexico law on punitive damages in a tort action for the failure of a uranium mill tailings structure.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, whose names are listed in the next following paragraph, respectfully pray that a writ of certiorari issue to review the interlocutory order of the United States District Court for the District of New Mexico entered in this proceeding on October 12, 1982.

The names of Petitioners are: Fred Adakai and Lenita Adakai, husband and wife; Jack Adakai and Minnie Adakai, husband and wife; Nonabahi Arviso; Wilhelmina Arviso; Betty Barney; Dorathy Begay; John Begay and Shirley Begay, husband and wife; Kieyone Begay and Mary Begay, husband and wife; Sammy Begay; Josephine Benally; Kee Joe Benally and Betty A. Benally, husband and wife; Bessie Begay Bills; John Kenneth Billy and Betty Rose Billy, husband and wife; Sam Blackgoat and Jennie Blackgoat, husband and wife; Gilbert Brown; Herbert Charley and Marjorie A. Charley, husband and wife; Tom Charley and Mary Jane Charley, husband and wife; Billy Chee and Irene Chee, husband and wife; Leonard Chee and Julia Chee, husband and wife; Tom Chischilly and Marilyn Chischilly, husband and wife; Tom G. Chischilly and Bertha B. Chischilly, husband and wife; Billy Cornfield and Ann Shorty Cornfield, husband and wife; Robert Craig, Jr. and Marie J. Craig, husband and wife; Aurelia Curley; Rebecca Damon; Frank J. Davis and Mary Davis, husband and wife; Helen

Dedman; Lee Fred Douglas, Sr. and Annie Rose Douglas, husband and wife; Wilson Earl and Helen M. Earl husband and wife; Kee Ellison and Dollie Begay Ellison, husband and wife; Dan Y. Frank and Winnie Frank, husband and wife; John Haley and Bah Tsosie Bah Haley, husband and wife; Paul Haley and Bonnie Haley, husband and wife; Robert Haley and Rose J. Haley, husband and wife; Ka Nip Pah Harrison; Johnny Holyan; Dean Houston and Bah Houston, husband and wife; John Hoxie and Blanche Hoxie, husband and wife; Tom Jefferson and Alice Jefferson, husband and wife; Narene W. Jim; Hoskie Joe and Lilly Joe, husband and wife; Leo Joe and Eva Joe, husband and wife; Mary T. Joe; Mary Ruth Joe; Tom Johnson and Emma Johnson, husband and wife; Walter Johnson and Esther Johnson, husband and wife; John Kee and Lucy Wood Kee, husband and wife; Buddy Lee and Louise Begay Lee, husband and wife; George Lee and Rose P. Lee, husband and wife; Mary Ann Lee; Nelson Lee and Irene Lee, husband and wife; Paul Lee and Faye T. Lee, husband and wife; Effie S. Lewis; Alfred Long and

Rose Long, husband and wife; Ben C. Long and Marie H. Long, husband and wife; Priscilla S. Long; Wayne Lynch; Bodie McCray and Pauline McCray husband and wife; Winifred Miller; Harrison Moore and Mary Moore, husband and wife; Maggie Moore; Anderson H. Morgan and Verna Mae Morgan, husband and wife; Diana Morgan; George Moss and Mary Moss, husband and wife; Benjamin Murphy and Mary Murphy, husband and wife; Lennie Parker and Grace Parker, husband and wife; Mary Jane Pinto; Nasbah Russell; Bennie T. Scott and Daisy Scott, husband and wife; Edward T. Sherman and Ella Y. Sherman, husband and wife; Ella Shirley; Tom Shirley and Milley Shirley, husband and wife; Margaret M. Silversmith; Douglas Skye and Marian Moss Skye, husband and wife; Danny Smith and Marjorie Smith, husband and wife; Emma Smith; Ga De Bah Smith; James Smith and Irene Smith, husband and wife; John Smith and Mary Yazzie Smith, husband and wife; Lee Smith; Raymond Smith and Eleanor C. Smith, husband and wife; Tony Smith and Mary H. Smith, husband and wife; Henry Spencer and Rose Spencer,

husband and wife; Joe Spencer and Elsie Tom Spencer, husband and wife; Mark Stevens and Jennie Stevens, husband and wife; Matilda Tabaha; Tommy Thomas and Mary Thomas, husband and wife; Bennie Thompson and Jorena Thompson, husband and wife; Joe Thompson, Sr. and Mary Louise Thompson, husband and wife; Leo Kee Thompson and Mary S. Thompson, husband and wife; George Tom and Elizabith Haley Tom, husband and wife; Rueben Tom and Pearl Tom, husband and wife; Juan R. Tsosie and Irene D. Tsosie, husband and wife; Mary B. Tsosie; Ella Upshaw; George D. White; Irene White; John White and Annie Yazzie White, husband and wife; Archie Whitegoat and Pauline Whitegoat, husband and wife; George Whitegoat and Lucy Whitegoat, husband and wife; Tom Whitegoat and Isabel Kayonnie Whitegoat, husband and wife; Joe John Wilson and Janice Wilson, husband and wife; John Wilson; Tom Wilson and Helena Wilson, husband and wife; Allen L. Yazzie and Margaret Yazzie, husband and wife; Ernest D. Yazzie; Fred R. Yazzie and Martha Yazzie, husband and wife; Glee Nebah

Yazzie; Henry Herbert Yazzie and Jane Yazzie, husband and wife; James J. Yazzie and Lucy Yazzie, husband and wife; Johnson Yazzie and Eleanor Yazzie, husband and wife; Kee Yazzie and Mary B.Y. Yazzie, husband and wife; Leonard Yazzie and Nancy Yazzie, husband and wife; Marion Yazzie and Esther Yazzie, husband and wife; Mary B. Yazzie; Mary Louise Yellowhorse; Paul Yellowhorse and Kathleen Yellowhorse, husband and wife. The Respondents are: UNC Resources, Inc., United Nuclear Corporation, UNC Mining & Milling Sevices, Inc., and Kaiser Engineers, Inc.

OPINION BELOW

The Opinion of the District Court, which is not reported, appears on the Appendix hereto. No Opinion was rendered by the Court of Appeals for the Tenth Circuit, which denied Petitioners' Petition for Leave to Appeal.

JURISDICTION

The Order of the Court of Appeals for the Tenth Circuit denying Petitioners' Petition for Leave to Appeal was entered May 25, 1983, and this Petition

for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), which reads in pertinent part:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari upon the petition of any part to any civil or criminal case, before or after rendition of judgment or decree. . .

STATEMENT OF THE CASE

This action concerns the July 16, 1979, breach of a uranium mill tailings impoundment dam at a UNC uranium mill near Church Rock, New Mexico (Complaint, Para. 24), and the resulting spill of more than 100,000,000 gallons of toxic liquid wastes and 1,100 tons of radioactive solid wastes into the nearby Puerco River. (Answers and Counterclaims, Para. 5.) Claimants are downstream landholders who have alleged damages to themselves and their families, their livestock, and their livelihoods because of the contamination of the

Puerco River.

Since 1977, UNC has been operating its uranium mill under a valid license from the State of New Mexico, which has the authority to regulate such activities under an agreement with the Nuclear Regulatory Commission (formerly with the Atomic Energy Commission) pursuant to 42 U.S.C. §2021(b). (UNC's Motion at 2.)

UNC brought this action in the U.S. District Court, District of New Mexico, to enjoin certain named claimants from pursuing in the Navajo Tribal Court civil actions for damages resulting from the spill. (Complaint at 1 et seq.) These claimants, and many other claimants who were allowed to intervene, answered, denying most of UNC's material allegations. They also filed counterclaims against UNC (and against Kaiser, which was joined as a defendant on the counterclaims), which, if proved, would justify recovery under New Mexico tort law. Specifically, claimants alleged that UNC engaged in conduct that would subject it to punitive damages under state law.

UNC moved for partial summary judgment on the issue of punitive damages, asserting primarily that the Federal Atomic Energy Act precludes an award for punitive damages in the present case.[1] The claimants opposed the motion, but it was granted by the District Court on October 12, 1982, on the issue of federal preemption. See Appendix. The Court essentially accepted the federal preemption position of UNC.

The District Court stated in its Memorandum Opinion and Order that it believed, pursuant to 28 U.S.C. §1292(b), that its Order "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation." Appendix at 6. A Petition for Leave to

---

[1] UNC also contended that such damages were impermissible under state law. The Opinion of the District Court was decided on federal preemption grounds, and the Court thus found it unnecessary to address the state law issue. Appendix at 6.

Appeal was timely made to the Court of Appeals for the Tenth Circuit, which was denied on May 25, 1983, without opinion.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH FEDERAL PREEMPTION PRINCIPLES RECOGNIZED BY THIS COURT.

This Court currently has before it on direct appeal Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, Deceased, v. Kerr-McGee Nuclear Corporation, No. 81-2159 (referred to below as "Silkwood"). One of the issues raised and extensively briefed by the parties and by various amici curiae is whether the Federal Atomic Energy Act (referred to below as "AEA") conflicts with the law of a state granting punitive damages in a tort action under certain circumstances, thus precluding an award of such damages in an action involving the emission of plutonium from a nuclear power plant. The present case presents the same general issue as in Silkwood (does the Act preclude punitive damages authorized by State law in a tort action concerning matters regulated by the

Act?), but also presents a specific issue not presented by Silkwood: Does New Mexico's agreement with the Atomic Energy Commission (now the Nuclear Regulatory Commission) allowing the State to regulate uranium milling within its borders allow the imposition of state law assessing punitive damages in a tort action for the release of uranium mill tailings?

A. NEW MEXICO'S LAW OF PUNITIVE DAMAGES IS NOT INCONSISTENT WITH AEA, NOR DO THE TWO LAWS REGULATE THE SAME CONDUCT.

Through its recognition of punitive damages in tort actions, New Mexico grants protection from conduct that is maliciously intentional, fraudulent, oppressive, reckless, or committed in wanton disregard of the rights of a Plaintiff. Loucks v. Albuquerque National Bank, 76 N.M. 735, 418 P.2d 191 (1966). AEA, however, deals with another subject entirely. The purposes of AEA, as described in 42 U.S.C. §2013, are to provide for:

(a) a program to support research and development;

(b) a program for the dissemination of unclassified information concerning nuclear energy;

(c) a program for government control of atomic energy and special nuclear material to provide for national defense, security, and welfare;

(d) a program for development and use "of atomic energy for peaceful purposes" as far as possible "consistent with the common defense and security and with the health and safety of the public;"

(e) a program of international cooperation concerning security and atomic energy for peaceful purposes; and

(f) a program of administration consistent with the foregoing goals.

Nothing in AEA specifically gives a private litigant a device to punish a tortfeasor for a particular culpable mental state (maliciousness, wantonness, or recklessness). The various penalties prescribed in AEA subchapters XV and XVII (42 U.S.C. §§2231 to 2242 and §§2271 to 2282) have been held by lower Federal

Courts to be inapplicable to private litigation. Susquehana Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980), cert. denied 449 U.S. 1096 (1981). Thus the allowing of punitive damages under state law serves a valid public policy concern by giving the private litigant additional motivation to pursue claims against tortfeasors. In this sense the allowing of punitive damages supplements the Federal scheme and encourages private parties to enforce rights which the Attorney General may be unable because of a number of factors to enforce himself.

Federal preemption is a matter of Congressional intent. A consideration of this issue begins with the assumption that Congress did not intend to supplant the challenged state law. Maryland v. Louisiana, 451 U.S. 725 (1981). In reviewing the present case, it is helpful to bear in mind that more is required than the apparent comprehensiveness of federal legislation to show a Congressional intent to supersede state law. New York State Dept. of Social Services

v. Dublino, 413 U.S. 405 (1973). In Pacific Gas and Elec. v. Energy Res. Comm'n, 461 U.S. _____ (April 20, 1983, No. 81-1945), in which this Court held that the State of California had authority to impose a moratorium on the certification of new nuclear energy plants for economic reasons notwithstanding AEA, the Court reviewed four situations in which a federal statute will preempt state law:

(a) When Congress has expressly precluded State action (Jones v. Rath Packing Co., 430 U.S. 519 (1977));

(b) When Congress has enacted a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it" (Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, _____ U.S. _____, _____ (1982));

(c) When compliance with both federal and state laws is physically impossible (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)); and

(d) When state law "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress" (Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

A review of each of these factors will indicate that AEA does not preempt the New Mexico law of punitive damages.

First. The Act contains no express prohibition against application of punitive damages.

Second. The Act is not a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it." It does not purport to regulate damages in tort actions between private parties (except to the extent that it sets a maximum limit of liability in the event of a nuclear incident). As noted above various portions of AEA provide for certain criminal penalities, but lower Federal Courts have held that such provisions do not aid private litigants. Punitive damages, however, do aid private litigants in tort actions involving extreme misconduct.

Third. Simultaneous compliance with the Act and with New Mexico's laws

regarding punitive damage is not impossible. One may comply with the Act and still refrain from wanton disregard of a plaintiff's rights.

Fourth. Application of New Mexico punitive damage principles will not stand as an obstacle to the implementation of the Act. As noted above, the laws pertain to different conduct. Indeed, when the Price-Anderson Act (42 U.S.C. §2210) was made a part of the Act, Congress left traditional state tort law principles intact. See H.R. Rep. No. 2043, 89th Cong., 2d Sess. 11 (1966); see also Duke Power v. Carolina Environmental Study Group, 438 U.S. 59, 88-89, n. 33 (1978). Further, also as noted above, the two laws provide for different remedies for different kinds of litigants. The Act allows the government, acting through the Attorney General, to obtain specified civil, criminal, and injunctive relief. New Mexico's law of punitive damages allows a private litigant, in seeking redress of a private grievance caused by a tortfeasor engaging in extreme misconduct, to obtain damages in addition to

compensation.

B. NEW MEXICO'S AGREEMENT STATE STATUS ALLOWS THE IMPOSITION OF NEW MEXICO PRINCIPLES OF PUNITIVE DAMAGES.

Petitioners have shown above that AEA and New Mexico's principles of punitive damages regulate different conduct and different litigants and thus AEA does not preempt New Mexico law. There is, however, an additional reason that AEA does not preempt New Mexico law in this case: by entering into an agreement with New Mexico for the state to regulate disposal of byproduct materials, NRC has ceded federal authority to regulate byproduct materials to the state. The Act expressly permits the states to exercise some regulatory powers in the field of atomic energy. Subsection 274(b) sets forth criteria and procedures for the transfer of authority from the Atomic Energy Commission (AEC, now NRC) to the states. The states are allowed to take control in specific areas by entering into agreements with the federal government. The Act states:

> Except as provided in

> Subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any state providing for discontinuance of the regulatory authority of the Commission under Subchapters V, VI and VII of this chapter and §2201 of this title with repect to any one or more of the following materials within the state:
> (1) byproduct materials;
> (2) source materials;
> (3) special nuclear materials in quantities to form a critical mass.
> During the duration of such an agreement, it is recognized that the state shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards. 42 U.S.C. §2021(b) (Emphasis added)

On May 1, 1974, New Mexico became an "Agreement State" pursuant to the provisions of 42 U.S.C. §2021(b) 39 Fed. Reg. No. 82, April 26, 1974, p. 14743. That agreement allowed New Mexico to control the licensing and regulating of byproduct materials. ("Byproduct materials" include tailings or wastes produced in

connection with the extraction or concentration of uranium. 42 U.S.C. §2014(e). The wastes that are the subject of Petitioners' tort action against Respondent are "byproduct materials.")

The 1978 Uranium Mill Tailings Radiation Control Act ("UMTRCA"), 42 U.S.C. §2014, et seq., was passed as an amendment to AEA to accomplish two functions: (1) to require the cleanup of potentially dangerous tailings piles near abandoned mill sites (Title I); and (2) to provide for the safe management of tailings from active mills (Title II). Title II of UMTRCA requires Agreement States, such as New Mexico, to meet NRC's minimum standards within three years of the effective date of UMTRCA and also allowed Agreement States to adopt standards "which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose. . ." 42 U.S.C. §2021(o)(2) (emphasis added). Further, as the District Court Opinion noted, Appendix at 5:

> As to that subsection [42 U.S.C. §2021(o)(2)] the Commission commented that, 'it requires that state standards for licensing uranium mill tailings and uranium millings must to the extent practicable be equivalent to, or exceed, those of the Commission.' [H.R. No. 95-1480, 95th Cong., 2nd Sess. reprinted in 1978 U.S. Code Cong. and Ad. News 7433, 7472].

The District Court dismissed Petitioners' argument that New Mexico's Agreement State status and the language of 42 U.S.C. §2021(o)(2) and the Commission comment give New Mexico the authority to apply its own law of punitive damages in a tort case by stating:

> While [the above-quoted language] seems to run contrary to Congress' stated desire for uniformity, it must be remembered that any state's 'more stringent' standard will be incorporated in an Agreement fully subject to NRC approval and review.

Appendix at 6. The District Court's position is not well-founded.

First, 42 U.S.C. §2021(o) does not

require that all state standards that are "more stringent than" federal regulations be incorporated into the Agreements. Thus, although NRC is required to review Agreements periodically under 42 U.S.C. §2021(j), there is no corresponding duty to review the state standards that are more stringent than federal standards. The only grounds for termination or suspension of an Agreement are that (1) termination or suspension is necessary for public health and safety, or (2) the State has not complied with law.[2] 42 U.S.C. §2021(j)(1). The imposition of punitive damages would not endanger public health and safety, and adopting more stringent state standards would be in furtherance of the Act -- not in violation of it.

Second, and more important, the District Court's reasoning is inconsistent with federal preemption principles. Even assuming that NRC had the authority

---

[2]These are the only grounds in a nonemergency. Emergency temporary suspensions are governed by 42 U.S.C. §2021(j)(2).

to prevent an Agreement State from applying its law of punitive damages in a tort action, it has not done so. The presumption is against, not in favor of, federal preemption of state law.

The District Court Opinion speaks of a Congressional intent of promoting uniformity. Appendix at 4. Petitioners agree that Congress wished to promote uniformity in the regulation of disposal of byproduct materials -- but only to the extent of establishing uniform miminum standards. Otherwise, Agreement States, such as New Mexico, are free to regulate the disposal of byproduct materials as they deem appropriate. The Congressional statement of the purpose of 42 U.S.C. §2021 states in part:

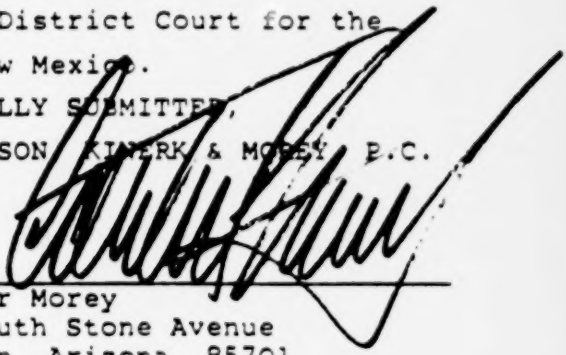
> (a) It is the purpose of this section --
>
> * * *
>
> (4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States . . .

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Memorandum Opinion and Order of the United States District Court for the District of New Mexico.

RESPECTFULLY SUBMITTED,

HARALSON, KIVERK & MOREY, P.C.



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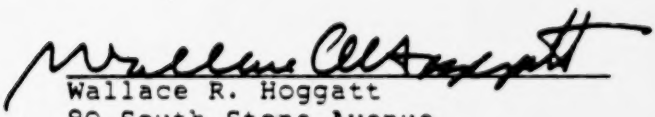

Wallace R. Hoggatt
80 South Stone Avenue
Tucson, Arizona 85701

September 19, 1983.

MAY TERM - May 25, 1983

Before Honorable William J. Holloway, Jr. and Honorable William E. Doyle, Circuit Judges

UNC RESOURCES, INC., a Virginia corporation, et al.,	)	
Plaintiffs and Counterdefendants-Respondents,	)	Miscellaneous 82-8056
vs.	)	
KEE JOE BENALLY, et al.	)	
Defendants and Counterclaimants-Petitioners,	)	
JACK ADAKAI, et al.,	)	
Intervenors and Counterclaimants.	)	

This matter comes on for consideration of petitioners' petition for leave to appeal pursuant to 28 U.S.C. § 1292(b), filed in the captioned case.

Upon consideration whereof, the petition for leave to appeal is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNC RESOURCES, INC., a
Virginia corporation, et al.,

Plaintiffs and
Counterdefendants,

vs.

CIV NO.
80-750 HB

KEE JOE BENALLY, et al.,

Defendants and
Counterclaimants,

and

JACK ADAKAI, et al.,

Intervenors and
Counterclaimants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff United Nuclear Corporation's (UNC) motion for partial summary judgment on the issue whether punitive damages may be awarded in this case as a matter of law. Having considered the arguments of the parties and the authorities, the court concludes that punitive damages are barred as a matter of federal preemption.

APPENDIX B

Plaintiff's motion, therefore, will be granted.

This case involves the failure of UNC's uranium mill tailings impoundment structure at Church Rock, New Mexico in July, 1979, as a result of which the numerous Navajo claimants ("claimants") herein seek both compensatory and punitive damages. UNC contends that under Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981) these punitive damage claims have been federally preempted and must be dismissed.

In Silkwood the plaintiff brought a common law tort action against her employer for injuries she suffered from plutonium contamination. Silkwood had worked as a lab analyst at a plant operated by Kerr-McGee that fabricated fuel pins containing plutonium for use as reactor fuel. The jury awarded $10,000,000 in punitive damages against defendant Kerr-McGee, but on appeal the 10th Circuit reversed on the ground that "any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with

plants handling nuclear material" is preempted. 667 F.2d at 923. The Court further held that "a judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state." Id.

Claimants argue that Silkwood is inapplicable because it involved a non-Agreement State, Oklahoma. Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, permits the Nuclear Regulatory Commission (NRC) to discontinue its regulatory authority over certain aspects of the nuclear industry within a state after entering into an agreement with the state's governor. The state entering such an agreement then assumes the "authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." 42 U.S.C. § 2021(b). New Mexico assumed regulatory authority over uranium mill tailings pursuant to an agreement with

the Commission on May 1, 1974. 39 Fed. Reg. 14743 (1974).

The distinction between Agreement States and non-Agreement States was noted by the court in Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), the case on which the court in Silkwood heavily relied. While holding that Minnesota had no authority to regulate the levels of radioactive effluents discharged from nuclear power plants because of the doctrine of preemption, the court noted that Minnesota had no agreement with the AEC (NRC) under which that state assumed such regulatory authority:

> It is important to note, however, as Minnesota concedes, that radioactive discharges from nuclear power plants does not fall within any of the three categories enumerated in § 2021(b) over which AEC authority may be relinquished by means of such turn-over agreements. Moreover, it is undisputed on this record that Minnesota has not entered into a turn-over agreement with the AEC.

447 F.2d at 1148.

The claimants herein bolster their argument that the reasoning and holdings in Silkwood and Northern do not preclude punitive damage awards where the Commission has relinquished its regulatory authority by pointing to the 1978 amendments to § 2021, enacted as the Uranium Mill Tailings Radiation Control Act. Subsection (o)(2) thereof provides that in the licensing and regulation of by-product material, which includes uranium mill tailings, a state operating under an agreement with the NRC "shall require compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, ..." (Emphasis added.) Claimants insist that the emphasized language manifests a clear Congressional intent that Agreement States maintain

full control over uranium mill tailings so long as the minimum federal requirements are met. Thus, New Mexico being an Agreement State, there is no federal preemption of New Mexico law which arguably allows the imposition of punitive damages.

It seems clear, and claimants do not dispute, that under Silkwood punitive damages would not be recoverable if New Mexico were a non-Agreement state. This case then poses the problem whether Congress, by enacting the Agreement State program in 1959 and more particularly the 1978 amendments thereto, intended a different result to obtain in Agreement States.

The legislative history of 42 U.S.C. § 2021 as it was originally enacted in 1959 indicates that Congress, in authorizing the relinquishment of certain regulatory responsibilities to the states, was concerned about the possibility of subjecting the nuclear industry to non-uniform standards. In recommending the bill the Joint Committee on Atomic Energy commented:

> 5. The Joint Committee believes it important to emphasize that the radiation standards adopted by States under the agreements of this bill should either be identical or compatible with those of the Federal Government . . . . The Committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hinderance of industry and jeopardy of public safety.
> . . .
> . . . In most cases, it is intended that State and local standards should be the same as Federal standards in order to avoid conflict, duplication, or gaps.

S.Rep.No. 870, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Ad. News, 2872, 2879, 2882.

This concern with uniformity is reflected in the purposes of the Agreement State program which Congress enumerated at § 2021(a). They include cooperation between the states and the Commission, § 2021(a)(2), promotion of an

orderly regulatory pattern between the states and the Commission with respect to the regulation of nuclear materials, § 2021(a)(3), and coordination of the development of radiation standards, § 2021(a)(5). It is also evident in subsections (d)(2), (g), and (j), which emphasize coordination between the Commission and Agreement States and the compatibility of their respective programs. Pursuant to these subsections the NRC conducted annual reviews of the Agreement States' regulatory programs. Grammer, The Uranium Mill Tailings Radiation Control Act of 1978 and NRC's Agreement State Program, 13 Nat. Res. Law, 469, 502 (1981). The NRC interpreted these subsections to require that state radiation protection standards be identical with NRC standards. 26 Fed. Reg. 2537 (1961). Thus, far from being a complete relinquishment of regulatory authority, the 1959 version of the Agreement States program contained numerous provisions for continued federal control. See also 10 C.F.R. 8.4(d) and (j); Train v. Colorado Public Interest

Research Group, 426 U.S. 1, 16 (1976).

Although the 1978 Uranium Mill Tailings Act made many changes in the Agreement State program those changes were in the direction of tightening federal controls. Grammer, supra, at 516-520. The NRC is now directed to conduct periodic reviews of state programs and actions. § 2021(j)(1). Agreement State licensing of milling and mill tailings must now comply with federal standards and regulations, not just be compatible. § 2021(o). Under subsection (c) the NRC now has authority over long-term uranium mill tailings management in Agreement States:

> The reserved NRC authority over long-term uranium mill tailings management in Agreement States marks the end of any clear separation of federal and state authority that may have been envisaged in 1959 by the creators of the Agreement State program. In addition to its indirect regulation of milling in Agreement States through establishment of minimum national standards the NRC will assume certain direct responsibilities for uranium mill tailings and

> their disposal sites upon termination of milling activities and stabilization and decommissioning of the tailings and the mill site.

Grammer, supra, at 518.

That the overriding and motivating Congressional purpose in enacting the amendments to the Agreement States program was to establish a uniform national program for the regulation of uranium mills and mill tailings is explicitly stated in the legislative record:

> The intent is to insure that any analysis (by a State) is carried out in a manner that is consistent with NEPA, so that mills located in a non-agreement State are not subject to different requirements than their competitors which are located in an agreement State. Indeed, that is an objective of the entire subsection.

H.R. No. 95-1480, 95th Cong., 2nd Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 7433, 7472.

Claimants rely almost entirely on the language of § 2021(o)(2) quoted above

which authorizes the states to set standards "more stringent than" Commission standards. As to that subsection the Commission commented that, "it requires that State standards for licensing uranium mill tailings and uranium milling must to the extent practicable be equivalent to, or exceed, those of the Commission." Id. While this seems to run contrary to Congress' stated desire for uniformity, it must be remembered that any state's "more stringent" standard will be incorporated in an Agreement fully subject to NRC approval and periodic review.

The Agreement between the Commission and New Mexico by which the state assumed regulatory authority over uranium mill tailings gives no support to claimants' position that New Mexico has a free hand in this area. Emphasized throughout is the necessity for cooperation, coordination and compatibility between the federal and state programs and agencies. 39 Fed. Reg. 14743 (1974).

In light of the numerous provisions for continued federal oversight of the

regulation of uranium mill tailings even in Agreement States, the court finds persuasive UNC's argument that punitive damages cannot be awarded in this case because of federal preemption. The states are permitted to regulate in this area only under direct federal supervision and only in conformance with federal standards. Unsupervised regulation through imposition of punitive damages in private suits does not fit within the regulatory framework envisioned by Congress. In light of its disposition of this issue, the court finds it unnecessary to address the issue whether punitive damages are allowed under state law in this case.

Now, Therefore,

IT IS BY THE COURT ORDERED that plaintiff UNC's motion for partial summary judgment on the issue of punitive damages is granted and the punitive damage claims are dismissed.

Pursuant to Title 28 U.S.C.A. § 1292(b), the Court is of the opinion that this order involves a controlling question of law as to which there is

substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

_____
Chief Judge

42 U.S.C. §2014

(e) The term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

APPENDIX C

42 U.S.C. §2021

(j) Reserve power to terminate or suspend agreements; emergency situations; State nonaction on causes of danger; authority exercisable only during emergency and commensurate with danger

(1) The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the

provisions of this section.

42 U.S.C. §2021

In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section a State shall require --

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency

pursuant to sections 2113, 2114, and 2022 of this title

§2021 U.S.C. Cooperation with States -- Purpose

(a) It is the purpose of this section -- . . .

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilites with resect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

APPENDIX F

Office - Supreme Court, U.S.
FILED
OCT 26 1983
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CLERK

No. 83-515

In The

Supreme Court of the United States

October Term, 1983

KEE JOE BENALLY, et al.,

Petitioners,

v.

UNC RESOURCES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction of this petition for certiorari?

2. Did the Tenth Circuit Court of Appeals abuse its discretion in denying leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) (1976)?

3. Will this Court review a federal district court's ruling where the federal action subsequently has been stayed in favor of a parallel state court action in which a substantial state law question still pends?

PARTIES BELOW

In addition to the petitioners identified in the petition, the other parties to the district court proceedings are UNC Resources, Inc., a Virginia corporation; United Nuclear Corporation, a Delaware corporation; UNC Mining and Milling Services, Inc., a Delaware corporation (hereinafter collectively referred to as UNC)* and Kaiser Engineers, Division of Henry J. Kaiser Company, a Nevada corporation.

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*UNC Mining and Milling Services, Inc., is a wholly owned subsidiary of United Nuclear Corporation, which is a wholly owned subsidiary of UNC Resources, Inc. UNC ATLIS Systems, Inc., and Summit Mortgage Investors are nonwholly-owned subsidiaries or affiliates of UNC Resources, Inc. In addition, UNC Teton Exploration Drilling Company, which is a wholly owned subsidiary of UNC Resources, Inc., holds a 50% ownership interest in Teton Australia Pty., Ltd. and Stelbourne Pty., Ltd., both of which are incorporated in Queensland, Australia. Stelbourne holds a 50% ownership interest in Davies Drilling and Remet Engineers, both of Australia.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

We believe that this Court lacks jurisdiction. To avoid duplication, we set out the facts and relevant legal principles as among the reasons for denying the writ.

STATEMENT OF THE CASE

Petitioners have omitted several material facts from their statement of the case: (1) In 1981 petitioners filed a separate action in state court in New Mexico, adding new parties but

raising the same issues present in the federal district court case, *Adakai, et al. v. UNC Resources, Inc., et al., McKinley County District Court*, No. Civ. 81-163. (2) As did the federal district court, the state court held as a matter of federal preemption that petitioners' claims for punitive damages were barred. The state court's order is Appendix A to this brief. Neither the state court nor the federal court, Pet. at App. 11B, ruled upon respondents' alternative argument that the claim for punitive damages was barred as a matter of state law. (3) On agreement of the parties, the federal district court, on March 7, 1983, stayed the proceedings in this case pending trial of the same claims in the state court action. The district court's order is Appendix B to this brief.

SUMMARY OF ARGUMENT

The petition is directed to the wrong court and raises the wrong issues. On its face the petition is directed to the Tenth Circuit Court of Appeals. But petitioners ask that a writ issue "to review the interlocutory order of the United States District Court." Pet. at 1. This Court has no jurisdiction to review an interlocutory decision of a district court. The only issue that properly might be raised is whether the Tenth Circuit abused its discretion in denying leave to appeal. Petitioners, however, do not raise this issue nor do they have facts or legal authorities that would support such a claim.

The issue that petitioners have raised is of no practical or legal consequence. The district court proceedings have been abated, and the state court might preclude a punitive damages award on state law grounds. At best a ruling by this Court in petitioners' favor would be an advisory opinion to the state court. That function could be served as well by this Court's decision in *Silkwood v. Kerr-McGee Nuclear Corp.*, No. 81-2159, which recently was argued.

REASONS FOR DENYING THE WRIT

I. *This Court Has No Jurisdiction.*

This now purports to be a petition for certiorari to the Tenth Circuit Court of Appeals.[1] Petitioners, however, still seek Supreme Court review of an interlocutory district court decision on a question of law. Petitioners cite no statutory basis for such review, and there is none.

If this is to be regarded as truly a petition to the Tenth Circuit Court of Appeals, there is still no jurisdiction. The Court has statutory certiorari jurisdiction over the courts of appeals only as to those cases that are "in" the courts of appeals. 28 U.S.C. § 1254(1) (1976). When, as here, the court of appeals has exercised its discretion to deny leave to file an interlocutory appeal, the case is not "in" the court of appeals at all and therefore the certiorari act does not apply. *See Davis v. Jacobs*, 102 S. Ct. 417, 418 (1981) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari); *id.* at 420 (Rehnquist, J., dissenting).[2]

This Court in any case, has no jurisdiction to review the merits of the district court's determination without first determining that the court of appeals abused its discretion

[1]Petitioners' August 19, 1983 petition, which was not accepted for filing, specifically was directed to the district court. Except for the cover, however, there is little difference between the August petition and the petition currently before the Court.

[2]Nor is there jurisdiction under the All Writs statute. This petition does not purport to lie under the All Writs statute. Furthermore, the All Writs statute is inapplicable in cases of interlocutory review where there is no eventual direct appeal to this Court. *Cf. United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945) (accepting jurisdiction under All Writs statute of appeal of a district court's interlocutory order only because under the Expediting Act, "sole appellate jurisdiction lies in this Court").

in denying leave to appeal. Petitioners, however, have not raised this issue, and therefore, it is not before this Court. *Namet v. United States*, 373 U.S. 179, 190, 83 S. Ct. 1151, 1157, 10 L. Ed. 2d 278 (1963); Sup. Ct. R. 21.1(a).

II. *The Tenth Circuit Did Not Abuse Its Discretion in Denying Leave to Appeal.*

If the Court decides that it has jurisdiction and that the issue presented is whether the Tenth Circuit Court of Appeals abused its discretion in denying review under 28 U.S.C. § 1292 (1976), the petition nevertheless should be denied. There is no suggestion or evidence in the petition that the Tenth Circuit abused its discretion, nor could such a claim be made successfully. As Wright, Miller, and Cooper have observed, 17 *Federal Practice & Procedure* § 4036, at 13 n.18 (1978) "the discretion to deny interlocutory appeal under 28 U.S.C.A. § 1292(b), . . . is so broad that Supreme Court reversal should never be available."

III. *There Are No "Special and Important Reasons" for Granting the Writ: the Federal Case is Moot and the State Court May Decide This Question on State Law Grounds.*

Petitioners' sole argument for issuance of a writ is that the district court's ruling conflicts with federal preemption principles recognized by this Court. Pet. at 10. Their concerns, however, are with the safety of radioactive waste material and they argue that allowing punitive damages supplements the federal scheme in this area. Pet. at 13, 21. Thus, the district court was correct: The punitive damages claims are preempted because "the federal government has occupied the entire field of nuclear safety concerns, except for the limited powers expressly ceded to the states." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1717, 1726 (1983).

A more serious failing in the petition is that whether a conflict exists is of academic interest only. The federal case has been stayed and abated. The state court now has the matter. If *Silkwood* is reversed, the state court will rule upon respondents' alternative argument that New Mexico state law precludes an award of punitive damages under the circumstances of this case. Regardless of the outcome, there will then be no federal preemption issue in the case. Therefore, the writ should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77, 75 S. Ct. 614, 618, 99 L. Ed. 897 (1955) ("we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute"); *cf. id.*, 349 U.S. at 74, 75 S. Ct. at 616 (" '[s]pecial and important reasons' imply a reach to a problem beyond the academic . . .").

As the foregoing demonstrates, under the best of circumstances any review by this Court would serve merely as an advisory opinion to the state court. Assuming *arguendo* that there is a need for an advisory opinion, that need will be satisfied by this Court's decision in *Silkwood, supra*. Petitioners concede that this case "presents the same *general* issue as in *Silkwood*." Pet. at 10 (emphasis in original). But they argue that the writ should be granted because New Mexico's "Agreement State" status[3] raises an issue not present in *Silkwood*. *Id.* at 11. Even if this were a new issue, that issue properly can come here, if ever, by certiorari to the state supreme court. 28 U.S.C. § 1257 (1976).

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[3]New Mexico has assumed regulatory authority over uranium mill tailings pursuant to an agreement with the Nuclear Regulatory Commission, as authorized by section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976).

As the district court correctly held, however, New Mexico's Agreement State status is not a basis for distinguishing the Tenth Circuit's decision in *Silkwood*. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-50 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). And, contrary to petitioners' assertions, the 1978 Uranium Mill Tailings Radiation Control Act ("UMTRCA"), 42 U.S.C.A. §§ 7901-7942 (West 1983), supports the district court's ruling. The legislative history of UMTRCA shows that the general intent was to insure "that mills located in a nonagreement state are not subject to different requirements than their competitors which are located in an agreement state." H.R. Rep. No. 95-1480, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7433, 7472.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW MEXICO COUNTY OF MCKINLEY
IN THE DISTRICT COURT

FRED ADAKAI, *et al.*,
Plaintiffs, (Filed: Nov. 28, 1982)

vs. No. CV-81-163

UNC RESOURCES, INC.,
et al.,

Defendants.

ORDER AND JUDGMENT

The above cause having come before the Court on the Motions of Kaiser Engineers, Division of Henry J. Kaiser Co. ("Kaiser"), and UNC Resources, Inc., United Nuclear Corporation, and UNC Mining & Milling Services, Inc. ("UNC") for partial summary judgment on the issue of punitive damages, and the Court having considered the record, submissions of the parties, and having heard oral argument, and being otherwise fully advised in the premises, and being of the opinion that the motions of Kaiser and UNC are well taken and should be granted on the ground that the Plaintiff's claims for punitive damages are barred as a matter of federal preemption, it is therefore,

ORDERED, ADJUDGED AND DECREED:

1. That Defendants UNC's and Kaiser's Motions for Partial Summary Judgment on the issue of punitive damages are granted;

2. That Defendants Kaiser and UNC are entitled to judgment on the issue of Plaintiffs' claims for punitive damages as a matter of law;

3. That judgment is hereby entered dismissing all punitive damage claims against Kaiser and UNC.

DATED this ____ day of _____, 1982.

/s/ Louis E. DePauli
District Court Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNC RESOURCES, INC.,
a Virginia corporation, *et al.*,

Plaintiffs,
Counterdefendants,

-vs-

(Filed: Mar. 7, 1983)

KEE JOE BENALLY, *et al.*, CIVIL NO. 80-750-HB

Defendants,
Counterclaimant,

and

JACK ADAKAI, *et al.*,

Defendant Intervenors,
Counterclaimants.

-vs-

KAISER ENGINEERS, DIVISION
OF HENRY J. KAISER COMPANY,
a Nevada corporation,

Defendant on Counterclaims.

O R D E R

The parties having agreed that the above cause should be stayed and abated until the trial of the same claims in the District Court of McKinley County, New Mexico; Now, Therefore,

IT IS ORDERED that the above action is stayed and abated until the trial of the same claims in the District Court of McKinley County, New Mexico.

/s/
UNITED STATES DISTRICT JUDGE